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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 403

UNITED STATES OF AMERICA, PETITIONER

v.

GERRITT JOHANNES VAN LEEUWEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 23–26) is reported at 414 F. 2d 758.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1969 (A. 27). On June 26, 1969, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including July 28, 1969. The petition was filed on July 28, 1969, and was granted on October 27, 1969 (A. 28). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fourth Amendment is violated when post office officials detain packages believed to contain

illegal matter for the short period of time needed to investigate available sources of information and apply for a search warrant.

STATEMENT

After a jury trial in the United States District Court for the Western District of Washington, respondent was convicted of illegally importing gold coins from Canada, in violation of 18 U.S.C. 545. He was sentenced to three years' imprisonment and fined $1,500 (A. 22).

The relevant facts are undisputed. At about 1:30 p.m. on Thursday, March 28, 1968, respondent deposited for mailing two twelve-pound packages at the post office in Mount Vernon, Washington, which is situated about sixty miles from the Canadian border. One package was addressed to a post office box at Van Nuys, California, and the other to a post office box at Nashville, Tennessee; both bore a return address in a nearby village. Respondent paid airmail registered postage for each package, and insured each one for $10,000, declaring that they contained coins or a coin collection (A. 18–19; G. Ex. 3).[1]

As respondent was leaving the post office, the postal clerk told Captain Belgard of the Mount Vernon po-

[1] The packages were designated as air mail, and postage was paid at the air mail rate, which is the rate prescribed for first class mailing of packages of that weight (see 39 C.F.R. 131.1, 136.1–136.2). Both parties have agreed throughout these proceedings that in the circumstances, particularly respondent's registering the packages, the postal officials properly regarded the packages as first class mail, not subject to discretionary inspection (see A. 18, 23; cf. *Santana* v. *United States*, 329 F. 2d 854, 856 (C.A. 1), certiorari denied, 377 U.S. 990).

lice, who happened to be present, that he was suspicious of the packages. Captain Belgard noticed that respondent's car had British Columbia license plates and that the return address on the packages was a vacant housing area of a nearby junior college. Captain Belgard called the Canadian Police, who in turn called R. J. O'Hearn, Customs Officer-in-Charge at Seattle, Washington (A. 19; Tr. 16–18, 21).

At about 3:00 p.m. that afternoon, O'Hearn telephoned the customs office in Van Nuys and learned that the addressee of one of the packages was under investigation by that office for trafficking in illegal coins. Because of the time differential, O'Hearn could not reach the customs office in Nashville, Tennessee, the destination of the other package, on the same afternoon. He telephoned that office the following morning and learned that the addressee of the second package was also being investigated for trafficking in gold coins (A. 15–16; Tr. 40–41).[2] O'Hearn then filed an affidavit for a search warrant for both packages with the United States Commissioner in Seattle (A. 5–6). At 4:00 p.m. that afternoon, the search warrant was issued at Seattle, and at 6:30 p.m. it was executed at the post office at Mount Vernon, approximately sixty miles from Seattle (A. 7–9; Tr. 48). When the packages were opened, they were found to contain several hundred gold coins (A. 9; Tr. 41–43). Thereafter, the packages were resealed and forwarded to the addressees, each of whom refused to accept the

[2] About 1:30 p.m. on March 29, 1969, respondent admitted to the Canadian police that he mailed two parcels at Mount Vernon after he had brought them into the United States (Tr. 32).

package (Tr. 12, 44). Both packages were returned to Mount Vernon within a few days (Tr. 12; Ex. 3).

Other evidence at the trial showed that respondent entered the United States from Canada with the two packages in his possession without declaring them to customs officials (Tr. 31–33, 67–68, 71–75).

The court of appeals reversed the conviction. It held that the coins were improperly admitted in evidence on the ground that the delay between the time that the packages were deposited at the post office and the time that the warrant was executed, a period of 29 hours, was "unreasonably long" and that detention of the packages for that period without judicial authorization violated the Fourth Amendment (A. 23–26). It reasoned that Inspector O'Hearn should have applied for a search warrant once he learned that the Van Nuys addressee was under investigation for trafficking in gold coins. The court concluded that he delayed too long, notwithstanding its observation that his decision to make an inquiry with respect to the Nashville addressee as well as the Van Nuys addressee was "an understandable exercise of caution" (A. 25).

ARGUMENT

I. INTRODUCTION AND SUMMARY

This Court has frequently emphasized that, except in certain narrowly defined classes of cases, the Fourth Amendment requires law enforcement officials to secure a warrant to search private property. *E.g., Chimel* v. *California,* 395 U.S. 752; *Johnson* v. *United States,* 333 U.S. 10. Federal customs and postal officials followed that command in this case. They con-

ducted an overnight investigation in order to confirm the suspicions created by the circumstances of respondent's mailing of the two packages. The next day, they presented the results of the investigation to a United States Commissioner, who issued a warrant to search the packages. That afternoon, the customs agents searched the packages pursuant to the warrant and discovered a substantial quantity of gold coins which had been illegally imported. The court of appeals implicitly found that the warrant was properly issued on sufficient facts to justify a search; nor did it question the government's right to seize and retain the coins which the search uncovered. It held, however, that the coins were inadmissible at trial because the time during which the unopened packages were detained at the post office was "unreasonably long, and the officers should have obtained a warrant authorizing the detention" (A. 25).

Even if, contrary to our submission here, the detention of the packages prior to the issuance of the warrant had violated the Fourth Amendment, the propriety of the court's application of the exclusionary rule would not be free from doubt. The fact that an individual has been subjected to a period of unlawful detention does not entitle him to release if subsequently a court or grand jury finds probable cause to hold him for further stages in the criminal process; that the individual was unlawfully held prior to the finding of probable cause does not affect the validity of that finding or its adequacy as a justification for continued detention. There is no reason to take a different view of this case where the customs agents' dis-

covery and seizure of the coins was justified by the warrant, issued on the basis of an ample showing of probable cause.

To be sure, tangible or verbal evidence secured from the individual as a "direct result" of an unlawful detention may not be admitted at trial, see *Wong Sun* v. *United States,* 371 U.S. 471, 485–486. But there is no relationship whatever in this case between the detention of the packages and the investigation which produced the facts to justify the warrant. That investigation would have been conducted the same way, with the same result, irrespective of whether the packages had been detained or forwarded to their destinations and the search warrants issued in those districts; the detention in no way aided the investigation.[3] The policies which underlie the exclusionary rule do not, in our view, require the suppression of evidence which was seized pursuant to a valid warrant merely because the facts justifying the issuance of the warrant were obtained while the property was unlawfully detained.

Although we would accordingly contend that the evidence in this case was properly admitted in all events, we believe that the fundamental error in the decision below is the court's conclusion that the detention of the packages prior to the issuance of the warrant was "unreasonably long". This holding of the court of appeals involves an issue of basic im-

[3] Accordingly, the present case is materially distinguishable from *Davis* v. *Mississippi,* 394 U.S. 721, on which the court of appeals relied. The arrest and detention of the petitioner in that case, which the Court held to be unlawful, was an indispensible condition of obtaining his fingerprints.

portance in law enforcement—the authority of officers to exercise some control over suspected property for a reasonable time needed to ascertain relevant facts and apply for a search warrant. As we show presently, this authority is part of the essential balance underlying the preference to be accorded to warrants, for the right to maintain the status quo assures the officers, and the public, that the property will not have been removed or destroyed by the time the officers secure a warrant. Here, the court of appeals found that the detention of the packages throughout the afternoon on which they were mailed was justified and that, by that time, the agents had obtained enough information to authorize a search. Yet, by delaying the application for a warrant until one final inquiry could be made on the following morning, the court held that the agents had detained the packages unreasonably. In these circumstances, however, we submit that the court below erroneously read the Fourth Amendment to prohibit governmental conduct which is entirely consistent with the practice of prior judicial authorization for searches which the Amendment contemplates.

II. THE DETENTION OF RESPONDENT'S PACKAGES FOR A REASONABLE TIME NEEDED TO MAKE A LIMITED INVESTIGATION AND APPLY FOR A SEARCH WARRANT DID NOT VIOLATE THE FOURTH AMENDMENT

1. This Court's opinions lend support to the proposition that the Fourth Amendment allows law enforcement officers to take limited action, reasonable under the circumstances, to prevent the removal or

destruction of suspected property pending the issuance of a search warrant. In response to arguments that the necessities of a situation required an immediate search without a warrant, the Court has offered as an alternative that the property could have been guarded during the time needed to obtain a warrant. Thus in *Taylor* v. *United States*, 286 U.S. 1, 6, the Court pointed out that a "short period of watching" during the time required to secure a search warrant could have prevented the possibility of any change in premises from which government agents had smelled the odor of whiskey. In *Trupiano* v. *United States*, 334 U.S. 699, 706, the Court, in condemning a warrantless search of an illegal distillery, noted that a warrant could have been obtained without any risk of removal of the suspected property since one of the agents "was on hand at all times to report and guard against such a move." See also *Chapman* v. *United States*, 365 U.S. 610, 614; *Davis* v. *United States*, 328 U.S. 582, 615 (dissenting opinion of Mr. Justice Frankfurter); *United States* v. *Jeffers*, 342 U.S. 48, 52; *United States* v. *Kaplan*, 89 F. 2d 869, 871 (C.A. 2) (L. Hand, J.); *Corngold* v. *United States*, 367 F. 2d 1, 3–8 (C.A. 9).

The necessary corollary of these statements is that the agent is authorized not only to watch but to guard—to prevent others from removing the property or, where appropriate, to take it into his custody. This authority serves to encourage respect for privacy as well as to satisfy the requirements of effective law enforcement. By avoiding the possibility that the warrant process will be an empty ceremony because

the property will have been removed or destroyed, this limited authority to ensure that the property will be amenable to search under warrant encourages the agent to submit his justification for the search to a neutral magistrate. It protects privacy by encouraging the postponement of a search in favor of a more limited interference with personal property in situations where a warrantless search might be justified because the property otherwise would be in danger of destruction or concealment. And in light of *Chimel* v. *California*, 395 U.S. 752, restricting the scope of a search incident to an arrest, there will be many more occasions where the guarding or detention of property is compelled by the circumstances.

In taking action to prevent the removal or destruction of suspected property until a search warrant is obtained, the agents unavoidably interfere, overtly or implicitly, with the rights of private individuals in the property. The government's action, whether or not denominated a "seizure" of the property, is of course subject to the limitations of the Fourth Amendment.[4] But it does not follow, as the court of appeals apparently believed, that a warrant is necessary to validate not only the search itself, but also the interim detention of the property; the Fourth Amendment does not compel the creation of a novel procedure to warrant such detention. The Fourth Amendment's command of reasonable governmental action has al-

[4] See *Terry* v. *Ohio*, 392 U.S. 1, 19; see also 39 U.S.C. 4057, which prohibits the *opening* of first class mail except pursuant to a search warrant. Respondent, in his brief in opposition, cited no statute or regulation, and we can find none, which deals with the detention of packages in the present circumstances.

ways been held to permit search and seizure without a warrant where exigent circumstances justify the failure to obtain prior judicial approval. See, *e.g.*, *Warden* v. *Hayden*, 387 U.S. 294, 298–299. Searches of automobiles and arrests and incidental searches of persons are well established instances where action without a warrant is permissible in light of the impracticability of securing a warrant. See *Carroll* v. *United States*, 267 U.S. 132; *McCray* v. *Illinois*, 386 U.S. 300; *Draper* v. *United States*, 358 U.S. 307; cf. *Ewing* v. *Mytinger*, 339 U.S. 594. And recently in *Terry* v. *Ohio*, 392 U.S. 1, the Court upheld, against a Fourth Amendment contention, limited on-the-street detention and search of persons, without a warrant, where the facts known to the officer justified a further investigation but were not sufficient to establish probable cause for an immediate arrest.

The need to guard or detain private property pending the issuance of a search warrant will arise where the officers encounter such property unexpectedly. Where the circumstances unmistakably establish probable cause to search the property, it is hardly to be doubted that the officer acts reasonably by detaining the property, without search, during the time required to prepare an affidavit and a warrant and to obtain a magistrate's disposition on the application. Frequently, however, the facts known to the officer, although strongly suggestive of criminality, do not justify the belief that a warrant should issue, but plainly call for a further investigation of readily ascertainable facts. In this situation, also, we believe that detention of the property, without a warrant, is

reasonable in order to permit the officer to make relevant inquiries, calculated to lead promptly to an accurate determination whether a search is justified. Without such limited authority, the careful officer who defers the decision to make an intrusive search until all available information is considered is likely to find his investigation frustrated by a removal or destruction of the property, if it is in fact connected with crime. Here, as in *Terry* v. *Ohio,* where there is much tension in the balance between the preservation of privacy and the apprehension of crime, it is appropriate to allow some limited power to the officer to preserve the status quo until a more accurate decision can be made.

As in the case of other actions which interfere with either personal or property rights, the conduct of law enforcement officials must be reasonable under the circumstances. The interference "must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible". In assessing its legality under the Fourth Amendment, the "inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry* v. *Ohio, supra,* 392 U.S. at 19–20.

2. The facts of the present case illustrate the type of situation where suspicious circumstances and the availability of prompt means of obtaining needed details justify a detention of suspected property to determine whether a search warrant should be sought. Even the court below acknowledged that the facts

known to the officers shortly after respondent deposited the packages at the post office "would reasonably have justified a brief detention, without a warrant, while a further investigation could be made" (A. 24).

Immediately after respondent left the packages for mailing, post office officials learned that the return address given on the packages was an uninhabited housing area in a nearby junior college. It is unusual, to say the least, for a person to give a fictitious address on packages which he insures for $20,000. The fact that respondent's automobile bore British Columbia license plates was further indication that he was not a resident of the community and gave rise to the suspicion that the packages may have contained coins that had been brought into the United States from Canada. In these circumstances, the postal officials had reason to suspect that the packages were connected with some illegal activity, and they were justified in declining to allow the mails to be used to carry out that scheme without some further investigation, cf. *Perr* v. *United States,* 363 U.S. 370, 389; to have done otherwise "would have been poor police work indeed" (*Terry* v. *Ohio, supra,* 392 U.S. at 23).

There were sound reasons in this case, moreover, for detaining the packages at the Mount Vernon post office rather than forwarding them through the mail while the investigation was conducted. The offense in respect of which the investigation was made involved the unlawful importation and concealment of gold coins, which took place in the Western District of

Washington; it would have been unwise to send the packages out of the district, with possible risk of loss or destruction of evidence, without their ever having been opened. Forwarding the packages through the mails also would have required two search warrants rather than one, involving the services of several United States Attorneys Offices and Customs Offices, and two magistrates, all of whom would be completely unfamiliar with local conditions in the district where all the information in support of the applications was gathered. Finally, once the investigation had been completed, it would have required additional time and manpower to locate the packages en route and to obtain the cooperation of the nearest federal offices to process the warrant applications. In light of the fact that respondent's identity was not known and that the focus of the investigation was the readily available information about the addressees of the packages, the agents reasonably declined to risk the substantial delays which would have resulted from forwarding the packages.

III. THE PERIOD DURING WHICH THE PACKAGES WERE DETAINED WAS NOT UNREASONABLE

The error which the court of appeals found in the government's conduct in this case was that the Customs Officer-in-charge did not apply for a warrant on the afternoon of March 28, the day when the packages were deposited at the post office, but rather waited until the following day so that he could determine whether there was any information concerning

the Nashville addressee.[5] Although the court of appeals thought that the officer had shown an "understandable exercise of caution", it held that the resulting delay until a search warrant was issued and executed was "unreasonably long" (A. 25). We submit, however, that the officer's exercise of caution is more consistent with the policy of the Fourth Amendment than the alternative of an immediate warrant application which the court of appeals suggested.

The decision of the court of appeals rested at least in part on its determination that the officers had probable cause to search the packages on the afternoon of March 28. Yet we are unable to understand how that determination can lead to the conclusion that it was unreasonable to delay overnight so that additional information could be secured. If it has any bearing on the question here, the fact that the officers already had probable cause to search supports the reasonableness of their conduct, because it eliminates the risk that the packages were being held without likelihood that a warrant would be issued.

Moreover, it is doubtful whether the protection afforded by the Fourth Amendment is advanced by judicial decisions which penalize the government for acting too slowly rather than too precipitously. In at least some cases in which property is detained, investigation of all readily available sources will disclose information which provides a satisfactory explanation for the suspicious circumstances which

[5] It was impossible to make this inquiry on March 28 because of the difference in time between the Pacific and the Central time zones.

prompted the investigation. Full investigation, consistent with the obligation to act with all practicable dispatch, should be encouraged since it reduces the risk that warrants will be sought and issued improvidently.

In addition, there are practical reasons why some flexibility must be accorded to law enforcement officers in appraising the sufficiency of their own investigation. As cases in this Court demonstrate (see, *e.g.*, *Spinelli* v. *United States*, 393 U.S. 410), it is not easy to determine whether particular facts establish the existence of probable cause as a matter of law. No matter how confident the officer is in his conclusion, it is necessary to persuade a magistrate to make an independent finding of probable cause, and, of equal practical importance, to have this done on a basis which will thereafter be sustained by the courts. Even if the customs officer should have concluded, as the court of appeals reasoned, that he had probable cause to believe that a crime had been committed once he learned that the Van Nuys addressee was under investigation for trafficking in gold coins, he reasonably could be concerned that a magistrate might think that the investigation of one addressee was not enough to justify opening one package, much less both. Obviously, additional information that *both* addressees were under surveillance for dealing in illegal coins would, and did, add significantly to the weight of the probable cause as to both packages.

Not only was that inquiry reasonably thought to be necessary by the customs officers, but, on the other side, the interference with privacy from the overnight

delay was slight. Respondent had declared, truthfully, that the packages contained coins. Although we do not believe that in equivalent circumstances the delay here would be unreasonable even as to written matter, the fact is that in this case there is not the slightest suggestion of a First Amendment problem. Nor was this a situation where perishable property might be damaged by delay in delivery. The significant Fourth Amendment interest was not whether the packages were forwarded to their destinations on the day they were deposited rather than the next day, but the *privacy* of the packages. This privacy was not disturbed until the approval of the magistrate was obtained. It was, therefore, reasonable for the officials to delay the packages the short time needed to obtain the information available as to both addressees.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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